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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951.

No. 136

AIR TRANSPORT ASSOCIATES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Air Transport Associates, Inc., petitioner, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on February 18, 1952, (R. 162) by which order a petition for review, (R. 1-29) of order of the Civil Aeronautics Board was dismissed.

Opinions Below

The opinion, (R. 38-68) separate opinion by Member Jones (R. 68-83) and the supplemental opinion and order

of the Civil Aeronautics Board[1] (R. 29-32) are not reported. The order (per curiam) of the United States Court of Appeals for the District of Columbia Circuit (R. 162) is not reported.

Jurisdiction

The order of the United States Court of Appeals for the District of Columbia Circuit was entered on February 18, 1952, (R. 162). This court extended the time to and including June 17, 1952, for filing this petition (R. 165). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), and section 1006(f) of the Civil Aeronautics Act, as amended, 52 Stat. 1024, 49 U.S.C. 646(f).

Questions Presented

The Board in its opinion of September 29, 1950, (R. 38-68), after extensive hearings and after applying the requisite standards as authorized by Congress (sec. 401(d)(1)) of the Civil Aeronautics Act, as amended, 52 Stat. 987, 49 U.S.C. 481(d)(1)[2] found in effect that Alaska Airlines, Inc., did not qualify for a certificate of public convenience and necessity authorizing it to operate regularly and receive government mail subsidy[3] to defray its operations; and directed the entry of an order providing, among other things, that Alaska Airlines, Inc., and Pacific Northern Airlines, Inc., be issued certificates of public convenience and necessity, which certificates were issued (R. 33-35).

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[1] Hereinafter referred to as "the Board".

[2] This statute provides: "The Authority shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

[3] Sec. 406, Civil Aeronautics Act of 1938, as amended, 52 Stat. 998, 49 U. S. C. 486.

This opinion was forwarded to the President of the United States for approval,[4] who, according to the supplemental opinion and order (R. 29-32), directed the issuance of certificates of public convenience and necessity to Pacific Northern Airlines, Inc., as recommended by the Board, and, in addition, directed that a certificate of public convenience and necessity be granted to Alaska Airlines, Inc. An order to this effect was accordingly made by the Board without further findings (R. 34-35).

Although petitioner filed with the Board an application for a certificate of public convenience and necessity on May 9, 1949, (R. 13, 27), such application has never been considered by the Board, although it was not until September 29, 1950, that its opinion was rendered (R. 36).

The questions presented are:

1. When an administrative agency does not, as expressly directed by statute, file in court a transcript of the record upon which an order sought to be reviewed was entered in a case when the validity of such orders is challenged because of the lack of regularity of the proceedings, and because of the lack of substantial evidence, may a Circuit Court of Appeals properly dismiss the petition without having available for inspection the entire record of the challenged proceeding?

2. When mutually exclusive applications for certificates of public convenience and necessity have been filed with an administrative agency by different carriers for identical

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[4] Sec. 801, Civil Aeronautics Act of 1938, as amended, (52 Stat. 1014, 49 U. S. C. 601) provides, in part:

". . . The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. . . ."

service over the same route, may that agency grant certificates to some of the applicants without considering all other such pending mutually exclusive applications?

3. Whether, in the absence of a statute expressly authorizing the President to order the issuance of a certificate of public convenience and necessity to an air carrier to engage only in "overseas air transportation"[5] in a case not involving "foreign air transportation",[6] did the Board have the power to issue such certificate at the direction of the President, although it had previously determined as an independent body of experts, entirely free from executive control or influence that the carrier did not meet the standards prescribed by Congress as a prerequisite to the issuing of such certificate?

Statutes Involved

The pertinent statutes involved are set forth in the Appendix.

Summary of the Matter Involved

Petitioner, a "noncertificated" air carrier, has been engaged since July, 1948, in transporting cargo and passengers between Seattle, Washington, and Alaska. On March 9, 1948, the Board instituted a proceeding to determine the adequacy of air cargo service performed by certificated air-

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[5] The transportation in question was between Seattle, Washington, and points in Alaska, and constituted "overseas air transportation"; defined by Sec. 1 (21)(b) of the Civil Aeronautics Act (49 U. S. C. 401) as transported between:

> ". . . a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; . . ."

[6] Sec. 1(21)(c) of the Civil Aeronautics Act, 49 U. S. C. 401, defines "foreign air transportation" as transportation between ". . . a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation. . . ."

lines between the Territory of Alaska and the continental United States. In this proceeding, the Board consolidated certain applications for certificates of public convenience and necessity filed by other airlines. Petitioner moved to intervene in that proceeding on November 2, 1948, which motion was not granted until after the close of the hearings in December, 1948. Petitioner filed an application for a certificate of public convenience and necessity with the Board on May 9, 1949, 16 months before the Board acted upon the application of Alaska Airlines, Inc., and Pacific Northern Airlines, Inc. on September 29, 1950 (R. 38-68). This application was "mutually exclusive" with the applications of Pacific Northern Airlines, Inc., and Alaska Airlines, Inc., as that term is used in *Ashbacker Radio Corp.* v. *Federal Communications Comm.*, 326 U. S. 327, 90 L. Ed. 108, 110. However, the Board has not yet considered petitioner's application although the Board is directed by statute to dispose of such applications as speedily as possible,[7] and petitioner has unsuccessfully requested early action thereon.

Petitioner asked the court below to set aside the orders of the Board (R. 1-28), granting certificates of public convenience and necessity to Pacific Northern Airlines, Inc., and Alaska Airlines, Inc. (R. 33-35), and to set its application for a certificate of public convenience and necessity for early hearing. Among the grounds urged for reversal of the Board's order was that the Board's action was not based upon substantial evidence in the record (R. 25). Notwith-

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[7] Sec. 401(e) of the Civil Aeronautics Act, 52 Stat. 987, 49 U. S. C. 481(e), provides: "(e) Upon the filing of any such application, the Authority shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Authority and to such other persons as the Authority may by regulation determine. Any interested person may file with the Authority a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Authority shall dispose of such application as speedily as possible."

standing the statute requires the Board to certify and file in the court below the transcript of the record upon which the order complained of was entered,[8] and directs these applications be set for public hearing and disposed of as speedily as possible, the Board neglected to file a complete transcript of the record, but attempted to file an "abbreviated record", which it lodged with the clerk of the court below. Petitioner objected to the filing of the "abbreviated record" upon the ground that the Board had no right to "hand pick" only those portions of the record it desired the court to consider when passing upon the Board's Motion to Dismiss, as the petition for review is based in part upon the lack of substantial evidence to support the orders being reviewed, and in part upon the lack of regularity of the administrative proceedings.

Certificates of public convenience and necessity are only issued in accordance with the standards prescribed by the Civil Aeronautics Act. That Act does not confer authority upon the Board to base the issuance of a certificate of public convenience and necessity solely upon "national defense" reasons (R. 74-75). It was not the intention of Congress to place upon the Post Office Department the burden of paying mail subsidy to defray the expense of air routes established solely for the purpose of national defense, as was done by the Board here in granting a certificate of public convenience and necessity to Alaska Airlines, Inc. Nothing in the Civil Aeronautics Act authorizes this.

If Section 801 of the Civil Aeronautics Act, requiring the President to approve a certificate for overseas transportation is to be construed as conferring upon him the right to order the issuance of such a certificate when, as here, such

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[8] Sec. 1006(c) of the Civil Aeronautics Act, as amended, 52 Stat. 1024, 49 U. S. C. 646, provides: "(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Authority by the clerk of the court; and the Authority shall thereupon certify and file in the court a transcript of the record, if any, upon which the order complained of was entered."

procedure violates the economic standards provided in the Act, this is a misconstruction of the statute. While the court below rendered no opinion, nevertheless in reaching its conclusion, it is apparent that it took this view of the law, unless it felt that the President had inherent powers such as he erroneously asserted in the Steel Seizure Cases. In either event, the action of the court below on this important point should be reviewed by this court and a rule of law established so the Civil Aeronautics Board, as well as the President, will be aware of their respective functions in these matters; and future action will not violate, as here, the rights of others.

The petition for review does not challenge the power of the President to approve or disapprove the decision of the Board in this case, dated September 29, 1950 (R. 36), but it is petitioner's position that the President's power with respect to this "overseas air transportation" is limited to approving or disapproving this decision of the Board because the statute provides that the issuance of any certificate "shall be subject to the approval of the President" (49 U. S. C. 601). The President's action in directing (R. 30) that Alaska Airlines, Inc., be issued a certificate, notwithstanding the finding by the Board that it did not meet the standards and requirements prescribed by statute (R. 36-83) is beyond his constitutional powers. The only authority vested in the President with respect to "overseas air transportation" as distinguished from "foreign air transportation" is that contained in Section 801 of the Civil Aeronautics Act (49 U. S. C. 601) which makes the issuance or denial of a certificate covering such transportation subject to the President's approval. It does not vest in the President the authority to *grant* a certificate of public convenience and necessity under the provisions of Section 401(d)(1) of the Civil Aeronautics Act (49 U. S. C. 481(d)(1)). Under the commerce clause of the Constitution,

only Congress has authority to regulate commerce. This it has done by delegating such authority to the Board with respect to overseas air transportation.

No formal executive order was ever issued by the President directing the granting of a certificate of public convenience and necessity to Alaska Airlines, Inc., under his general or executive powers. If issued, such executive order would be clearly beyond the authority and power vested in the President by the Constitution, and would violate that provision of the Constitution which gives only to Congress the right to regulate the air commerce here under consideration. For like reason, the action of the President here, being in excess of his powers under the Constitution, should be ignored.

Petitioner here is only asking the court to review the orders of the Board herein complained of, as authorized by Section 1006 of the Civil Aeronautics Act (49 U. S. C. 646). It is not asking the court to review any order of the President. In reviewing the orders of the Board, however, petitioner asks the court to set aside such orders issued at the President's direction when he told the Board to issue a certificate to Alaska Airlines, Inc. Such action was not binding on the Board as it was beyond his constitutional powers and was void *ab initio*.

Petitioner does not take the position here that the record made before the Board is insufficient to support the President's action, because the record before the court did not and does not indicate whether or not the Board's entire record in this case was ever sent to the President, ~~either~~ at the time the decision of the Board, dated September 29, 1950, was ~~ever~~ submitted for his approval. The supplemental opinion and order only states that the decision of the Board was submitted to the President for his approval, and therefore if this case is to be decided without the whole

record, we must assume that *only* the decision of the Board was sent to the President for action. Consequently, petitioner is not urging here that the record made before the Board is insufficient to support the President's action, because it is only the orders before the Board which are being reviewed here and not the action of the President.

As in the *Steel Seizure* cases, there is no statute that authorizes the President to take the action which he did. Here, as in the *Steel Seizure* cases, attempt was made to justify the action of the President upon the ground of national defense;[9] but, as in the *Steel Seizure* cases, there is no statute authorizing him to take the action which he did; and as in the *Steel Seizure* cases, the order cannot properly be sustained as an exercise of the President's military power as Commander-in-Chief of the armed forces.

Here, as in the *Steel Seizure* cases, the plan Congress adopted in the Civil Aeronautics Act did not provide for the President to step over the bounds fixed by Congress, and the statute here[10] did not authorize the President to

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[9] R. 30. On May 18, 1951, the President advised the Board that after taking into account all of the considerations and factors relating to this matter peculiarly within the scope of the Executive, particularly the need for air transport services to Alaska arising directly out of *national defense* activities, and the direct contribution which the fullest development of Alaska would make to *the national defense*, he had concluded that the Board's decision should be approved with the following changes:

1. Pacific Northern Airlines, Inc., should be authorized to serve Portland, Oreg., as a co-terminal point with Seattle, Wash.; and

2. Alaska Airlines, Inc., should be granted a route from the co-terminal points Seattle, Wash., and Portland, Oreg., to Fairbanks, Alaska, carrying passengers, property, and mail. The certificate should be temporary, expiring at the same time as the certificates of Northwest Airlines, Inc., and Pacific Northern Airlines, Inc., for operations between the United States and Alaska. (Italics supplied.)

[10] Section 801 of the Civil Aeronautics Act, 1938, as amended (52 Stat. 1014, 49 U. S. C., 601) provides:

"The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained

direct the issuance of a certificate of public convenience and necessity after the Board has determined, according to the standards prescribed by Congress, that a carrier does not meet such standards. The President cannot change the facts as found by the Board although he may disapprove the Board's findings. But his right to so disapprove does not carry with it the power to make independent findings which are contrary to the economically based findings of the Board.

The action taken by the President in the instant case is similar to the erroneous belief prevailing in some quarters prior to this Court's recent decisions in the *Steel Seizure* cases that the President possessed certain "inherent and implied war emergency or plenary powers," which were not prescribed by statute or conferred upon him by the Constitution, as he did in the "*Steel Seizure* cases" (*Youngstown Sheet & Tube Co.* v. *Sawyer*, 72 S. Ct. 863, and *Sawyer* v. *Youngstown Sheet & Tube Co.*) where this Court, on June 2, 1952, held that the order of seizure cannot properly be sustained as an exercise of any of the President's powers, including his military power as commander-in-chief of the armed forces. The President grounded his action on "national emergency activities" (R. 30). Here, as in that case:

> "The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President . . ." (72 S. Ct. 863 at p. 867.)

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in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President."

Reasons for Allowance of the Writ

1. The United States Circuit Court of Appeals for the District of Columbia Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

2. The United States Circuit Court of Appeals for the District of Columbia Circuit has decided a question of general importance and of substance relating to the construction of a statute of the United States involving the application of the Constitution of the United States that has not been, but should be, settled by this Court.

3. The order of the United States Circuit Court of Appeals for the District of Columbia Circuit is inconsistent with and probably conflicts with the opinions of this Court rendered June 2, 1952, in the cases of *Youngstown Sheet & Tube Co.* v. *Sawyer,* and *Sawyer* v. *Youngstown Sheet & Tube Co.,* 72 S. Ct. 863 and *Ashbacker Radio Corp.* v. *Federal Communications Comm.,* 326 U. S. 327.

These reasons are shown in petitioner's brief, filed herewith.

WHEREFORE, petitioner prays that a writ of certiorari issue under the seal of this Honorable Court directed to the United States Court of Appeals for the District of Columbia Circuit commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings had in the case numbered and entitled in its Docket 11,118 (April Term 1951) Air Transport Associates, Inc. *vs.* Civil Aeronautics Board, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the order herein of the said United States Court of Appeals

for the District of Columbia Circuit be reversed by this court, and for such other, further, or different relief as to this court may seem proper.

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CIVIL AERONAUTICS BOARD,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinion of the Court Below

No opinion was rendered by the United States Court of Appeals for the District of Columbia Circuit as this matter was disposed of by per curiam order (R. 162).

Jurisdiction

Reference is made to jurisdictional statement in the petition.

Statement of the Case

Reference is made to the "Summary of the Matter Involved" in petition.

Specification of Errors

1. The Court of Appeals erred in dismissing this complaint, because

a. No findings were made by the Board as prescribed by 49 U. S. C. paragraph 481(d), which is essential to the granting of a certificate of public convenience and necessity.

b. The Board found Alaska Airlines, Inc. to not meet the standards prescribed by the Civil Aeronautics Act as a prerequisite to granting of a certificate of public convenience and necessity.

c. When "Overseas air transportation" only is involved, after an agency determines that a carrier did not meet the standards prescribed by Congress as a prerequisite to the issuing of a certificate of public convenience and necessity, and the President for asserted reasons of "National Defense" later directs the agency to issue a certificate and the agency pursuant to such directions and without any further findings issues a certificate, the Agency's action is void and should be set aside.

d. When mutually exclusive applications for certificates of public convenience and necessity have been filed by different carriers for identical service the agency's action in granting certificates to some of the applicants without considering all other pending mutually exclusive applications is contrary to law.

e. The Court below misconstrued Section 801 of the Civil Aeronautics Act (49 U. S. C. 601).

f. There is no Act of Congress or provisions of the Constitution authorizing the issuance of a certificate of public convenience and necessity by direction of the President when the carrier receiving the certificate has been found to not meet the standards prescribed by Congress as a prerequisite to receiving one.

g. The orders sought to be reviewed contravene the following provisions of Section 10(e) of the Administrative Procedure Act (5 U. S. C. 1009(e)):

> "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence * * *."

(h) The hearings before the Board constitute a lack of procedural due process of law.

(i) The finding of the Board that Pacific Northern was fit and able properly to perform such transportation was not supported by substantial evidence, and hence was unlawful.

(j) The orders here reviewed violate the "Declaration of Policy" prescribed by section 2(c) of the Civil Aeronautics Act (49 U.S.C. 402 (c)).

(k) As all questions touching on the regularity and validity of proceedings of the Board pertaining to Alaska Airlines, Inc., are open to review by the Court, its responsibility can be discharged only by a review of the entire record of the proceeding before the Board in this case, the regularity and validity of which proceeding is herein challenged.

(l) The orders of the Board herein challenged do not, as required by Section 8(b) of the Administrative Pro-

cedure Act (5 U.S.C. 1007(b))[11] include a statement of the findings and conclusions as well as the reasons or basis therefor upon all the material issues of fact, law, or discretion presented on the record with respect to Alaska Airlines, Inc.

(m) The only delegation of authority by Congress, which alone can regulate commerce (Article I, Section 8 of the Constitution) is contained in Section 401 of the Civil Aeronautics Act giving the Board as an independent body of experts entirely free from executive control the right to act in accordance with that section.

Point 1

THE COURT BELOW ERRED IN DISMISSING THE PETITION WHICH SOUGHT REVIEW BECAUSE OF THE LACK OF REGULARITY OF THE PROCEEDINGS BEFORE THE BOARD AND THE LACK OF SUBSTANTIAL EVIDENCE WHEN THE COURT DID NOT HAVE THE ENTIRE RECORD OF THE PROCEEDINGS BEFORE IT, ALTHOUGH THE STATUTE REQUIRES A TRANSCRIPT OF THE RECORD BE FILED IN COURT.

Section 1006(c) of the Civil Aeronautics Act (49 U.S.C. 646[illegible]) provides that upon filing petition, the Board shall thereupon certify and file in the court a transcript of the record upon which the order complained of was entered. This clearly contemplates the filing of the entire record and not an "abbreviated record" as the Board here unsuccessfully sought to file (R-137). This Court said in American

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[11] 5 U. S. C. 1007(b) provides: "The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

Power Company vs. Securities and Exchange Commission, 325 U. S. 385, at page 392:

> "• • • Apparently it was not satisfied that the filing of an abbreviated transcript furnished a basis for affirmance. The Commission, without inordinate delay or additional expense, might have filed the full transcript of the proceedings before it and obtained the judgment of the court on the adequacy of the petition. With that we are not called upon to examine the merits of the Commission's contentions or to reverse the decision denying the motion to dismiss, or that denying the motion to dismiss or affirm • • •."

It is petitioner's position that all issues stemming from the petition filed herein are open for review.

As all questions touching on the regularity and validity of proceedings of the Board pertaining to Alaska Airlines, Inc. are open to review by the Court, its responsibility can be discharged only by a review of the entire record of the proceeding before the Board in this case, the regularity and validity of which proceeding is herein challenged. As the entire record of the proceeding before the Board was not before the Court below when it dismissed the petition, this court should take jurisdiction and reverse the lower court.

Point 2

THE COURT ERRED IN DISMISSING THIS CAUSE AND NOT SETTING ASIDE THE ORDERS OF THE BOARD GRANTING CERTIFICATES OF CONVENIENCE AND NECESSITY TO PACIFIC-NORTHERN AIRLINES, INC., AND ALASKA AIRLINES, INC., BECAUSE THE BOARD DID NOT CONSIDER PETITIONER'S APPLICATION FOR CERTIFICATE WHICH HAD BEEN PENDING FOR OVER SIXTEEN MONTHS.

Petitioner is Entitled to a Hearing on Its Application for a Certificate of Public Convenience and Necessity and Comparative Consideration with Other Applicants Seek-

ing to Engage in Substantially Similar Air Transportation.

Petitioner requests in its petition for review herein that the Civil Aeronautics Board be directed to set the matter of its application for a certificate of public convenience and necessity for early hearing. Its application is mutually exclusive of those that were consolidated in the *United States-Alaska Service Case,* supra, but its application was not consolidated with the others in that proceeding. Its application was filed with the Board after the close of the hearings before the Board but more than two years before the Board on May 24, 1951 issued its order herein sought to be reviewed (R. 29).

The situation here is similar to that existing in the case of *Northwest Airlines, Inc.* v. *Civil Aeronautics Board,* 194 Fed. (2d) 339, where the court stated "the test of mutual exclusiveness because of economical conditions should be as of the time the applications are being considered and an award is being made. * * * Where two bona fide applications are mutually exclusive, it is ordinarily true that one may not be granted without a hearing to both. This fundamental principle of fair play was announced by this Court in *Ashbacker Radio Corporation* v. *Federal Communications Commission,* 326 U. S. 327.

POINT 3

THE COURT ERRED IN DISMISSING THE PETITION BECAUSE IT SHOULD HAVE REVERSED AT LEAST THAT PART OF THE BOARD'S ORDERS GRANTING A CERTIFICATE TO ALASKA AIRLINES, INC.

Reasons for Granting the Writ

Determination by the Courts of the Distinction between Executive and Regulatory Functions under the Civil Aeronautics Act of 1938 Was Intended by Framers of the Act and the Congress in Adopting the Act.

The drawing of the line between executive action and administrative, quasi-judicial action was considered in connection with the study of the Civil Aeronautics Act of 1938. From the hearings conducted by the Committee on Interstate and Foreign Commerce of the House of Representatives, it appears that the question as to the limitations upon the action of the executive with respect to decisions of the Authority or Board arose several times. The proposal that the disposition of certificates of public convenience and necessity be subject to the approval of the President was left substantially as it appears in Section 801 of the Act under the belief of the Congress and governmental agencies interested that the courts would determine the area of executive function except as to the specific exception. Immunity from judicial review was specifically limited to orders in respect of any foreign air carrier subject to the approval of the President as provided in Section 801 of the Civil Aeronautics Act.

The following is from the testimony of Clinton M. Hester, Assistant General Counsel of the Treasury and representative of the Interdepartmental Committee on Civil Aviation, and Fred D. Fagg, Jr., Director of Air Commerce of the Department of Commerce, at the hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, 75th Congress, 3rd Session (House Report No. 2254):

> "Mr. Halleck: I recognize that, but I was looking at that section in the light of the words contained in section 801, subsection (a), which purports to make the action of the Authority subject to the general direction of the President except as respects those acts that are reviewable by the courts.
>
> "Mr. Hester: Well, we say that the dividing line is purely executive functions; the exercise of purely ex-

ecutive functions, which are not to be reviewable." Id., page 411; April 1, 1938.

* * *

"There (reference is to the reorganization statute of 1932, the Hoover Act) the President of the United States was trusted, or was authorized, to determine what is a regulatory function and what is an executive function.

"Under this bill we leave it to the courts to determine.

"So, Congress has once decided that the President did not need any definition of these terms, as they felt that the regulatory functions and the Executive functions were so well known and so well defined within the decisions that it is not necessary to define them.

"Here we turn it over to the courts."

* * *

"Mr. Halleck. Is it fair to say that this language of subsection (e) 'The terms and conditions, and limitations contained in any permit shall be subject to the approval of the President,' arises out of the fact that they involve foreign operations?

"Mr. Fagg. Yes, sir; and definitely so, and is limited to that." Id., page 412.

The legislative intention appears to have been that there should be judicial review of all matters under the Act except those relating to foreign operation. It is unfortunate that "or" is used instead of "and" in the phrase "overseas or foreign air transportation" included in section 801 of the Act, as the House Committee on Interstate and Foreign Commerce was not only informed as above by the representatives of the government agencies which had studied the matter and collaborated in the drafting of the law, but Mr. Hester testified earlier in the hearings (March 10, 1938):

"In the exercise of its quasi-legislative, or so-called quasi-judicial functions, such as the fixing of rates and *the issuance of certificates authorizing the operation of air lines,* the agency would sit as an administrative

court entirely independent of the executive branch of the Government." Id., page 37, italics ours.

Application of the principles laid down to date means one standard as to citizens applying for certificates of public convenience and necessity authorizing air transportation within the continental United States and another standard as to citizens applying for certificates authorizing air transportation between the continental United States and a territory, with no definition or way of ascertaining the standard in the latter instance. If the findings of the Civil Aeronautics Board are to be disregarded and a carrier found not to meet the requirements of the Act is to be granted a certificate, uniformity of application of legal requirements appear to require some definition and that the selection of such a carrier over other applicants should have a sound relationship to foreign affairs. This important matter should be determined by this court.

IN THE ABSENCE OF A STATUTE EXPRESSLY AUTHORIZING THE PRESIDENT TO ORDER THE ISSUANCE OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO AN AIR CARRIER TO ENGAGE ONLY IN "OVERSEAS AIR TRANSPORTATION" IN A CASE NOT INVOLVING "FOREIGN AIR TRANSPORTATION", THE BOARD DID NOT HAVE POWER TO ISSUE SUCH CERTIFICATE AT THE DIRECTION OF THE PRESIDENT, AS IT HAD PREVIOUSLY DETERMINED THAT THE CARRIER DID NOT MEET THE STANDARDS PRESCRIBED BY CONGRESS AS A PREREQUISITE TO THE ISSUING OF SUCH CERTIFICATE.

As stated by Member Jones in his separate opinion (R. 68), the principal issues [12]

"are to be determined in accordance with the Civil Aeronautics Act of 1938, as amended, particularly sec-

[12] He stated the principal issues to be as follows:

"(1) Whether the existing air freight service is adequate and/or whether there is a need for additional service in the transportation of property by the carriers named in the Board's order of investigation; (2) whether additional routes are required by the public convenience

> tions 205(a); 401; 404(a); 801; and 1002(b) . . . In making a recommendation to the President under Section 801, the Board must arrive at a quasi-judicial decision, which, incorporated in an opinion and order, must be delivered to the President prior to publication. This it must do as an independent body of experts entirely free from executive control or influence. 'Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control.' " [13]

These issues, in so far as Alaska Airlines was concerned, were answered in the negative by the Board's opinion of September 29, 1950 (R. 36-83) in which it refused to recommend the issuance of a certificate of public convenience and necessity to this carrier. As was stated by Member Jones (R. 74):

> "The Civil Aeronautics Act does not authorize the Board to make new route awards based solely on national defense requirements. The phrase 'and the national defense' as used in the Declaration of Policy must be read in context. It does not stand alone. It must be considered together with such phrases as 'sound economic conditions in [air transportation],' 'economic and efficient services,' and 'sound development of air transportation'.
>
> "The Board adopted this view early in its history. In a letter addressed to Congress through Senator Walter F. George in 1942, it made abundantly clear its belief that Congress had not intended to direct the Board to achieve national defense objectives [14] un-

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and necessity; and (3) if any additional routes are required by the public convenience and necessity, which applicant or applicants should be selected to perform such services."

[13] 333 U. S. at 109, quoting from *Humphrey's Executor* v. *United States*, 295 U. S. 602, 628.

[14] "If the contrary interpretations were adopted, there would be no limit to the national defense projects which carriers might be expected to perform; and the required financial assistance from Post Office appropriations might well be multiplied many times. The Board does not

related to the development of a sound air transportation system."

The Post Office Department took the position that there was no requirement for additional services for the carriage of mail in so far as the Postal Service was concerned (R. 75).

It follows therefore that the order of the Board dated May 24, 1951 (R-29-32) so far as it relates to Alaska Airlines, Inc., and the Certificate of Public Convenience and Necessity issued to Alaska Airlines, Inc. (R-34-35) should have been set aside by the court below.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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understand that Congress intended to authorize the Board to require air carriers, for example, to build up a large reservoir of aircraft, personnel, equipment, and other facilities greatly in excess of the requirements of a civil air transportation system, to be held virtually in trust or on call for war air-transport purposes. Congress vested in the Board no power by which it might effect such a result, and in the absence thereof, the objective of such a reservoir of planes, equipment, and reserve personnel, and organization could be realized only through the voluntary cooperation of the carriers . . . It normally would not be possible to absorb such a reservoir of aircraft, equipment, and such an organization in a sound air transportation system". (Underscoring supplied.)

Letter from the Chairman of the Civil Aeronautics Board in response to S. Res. 228; S. Doc. 206, Part 2, 77th Cong. 2d Sess., 1942.

APPENDIX A

RELEVANT STATUTORY PROVISIONS

28 U.S.C. 1254(1) provides:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Sec. 1(21)(c), Civil Aeronautics Act, 52 Stat. 977, 49 U.S.C. 401 provides:

"(21)(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation."

Sec. 205(a), Civil Aeronautics Act, 52 Stat. 984, 49 U.S.C. 425(a), provides:

"SEC. 205 [*52 Stat. 984, 49 U. S. C. 425*] (a) The Authority is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act."

"Sec. 401, Civil Aeronautics Act, 52 Stat. 987, 49 U.S.C. 481 provides:

SEC. 401 [*52 Stat. 987, 49 U. S. C. 481*] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority authorizing such air carrier to engage in such transportation: *Provided*, That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said

date, and thereafter until such time as the Authority shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier filed such application as provided herein.

Application for Certificate

"(b) Application for a certificate shall be made in writing to the Authority and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Authority shall by regulation require.

Notice of Application

"(c) Upon the filing of any such application, the Authority shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Authority and to such other persons as the Authority may by regulation determine. Any interested person may file with the Authority a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Authority shall dispose of such application as speedily as possible.

Issuance of Certificate

"(d)(1) The Authority shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Authority may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transporta-

tion and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder.

Existing Air Carriers

"(e) (1) If any applicant who makes application for a certificate within one hundred and twenty days after the date of enactment of this Act shall show that, from May 14, 1938, until the effective date of this section, it, or its predecessor in interest, was an air carrier, continuously operating as such (except as to interruptions of service over which the applicant or its predecessor in interest had no control), the Authority, upon proof of such fact only, shall, unless the service rendered by such applicant for such period was inadequate and inefficient, issue a certificate or certificates, authorizing such applicant to engage in air transportation (A) with respect to all classes of traffic for which authorization is sought, except mail, between the terminal and intermediate points between which it, or its predecessor, so continuously operated between May 18, 1938, and the effective date of this section, and (B) with respect to mail and all other classes of traffic for which authorization is sought, between the terminal and intermediate points between which the applicant or its predecessor was authorized by the Postmaster General prior to the effective date of this section, to engage in the transportation of mail: *Provided*, That no applicant holding an air-mail contract shall receive a certificate authorizing it to serve any point not named in such contract as awarded to it and not served by it prior to April 1, 1938, if any other air carrier competitively serving the same point under authority of a contract as awarded to such air carrier shall prove that it is adversely affected thereby, and if the Authority shall also find that transportation by the applicant to and from such point is not required by the public convenience and necessity.

(2) If paragraph (1) of this subsection does not authorize the issuance of a certificate authorizing the transportation of mail between each of the points between which air-mail service was provided for by the Act of Congress making appropriations for the Treasury Department and the Post Office Department, approved March 28, 1938, the

Authority shall, notwithstanding any other provision of this Act, issue certificates authorizing the transportation of mail, and all other classes of traffic for which authorization is sought, between such points, namely, (A) from Wichita, Kansas, to Pueblo, Colorado, via intermediate cities; (B) from Bismarck, North Dakota, to Minot, North Dakota; (C) from Detroit, Michigan, to Sault Sainte Marie, Michigan, via intermediate cities; (D) from Brownsville, Texas, via Corpus Christi, to Houston to San Antonio, Texas; (E) from Phoenix, Arizona, to Las Vegas, Nevada, via intermediate cities; (F) from Jacksonville, Florida, to New Orleans, Louisiana, via intermediate cities; (G) from Tampa, Florida, to Memphis, Tennessee, via intermediate cities, and from Tampa, Florida, to Atlanta, Georgia, via intermediate cities (which projects have been advertised); and (H) by extension from Yakima, Washington, to Portland, Oregon; and (I) by extension from Grand Rapids, Michigan, to Chicago, Illinois.

Terms and Conditions of Certificate

"(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Authority shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business

and the demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency, under regulations which may be prescribed by the Authority, between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Authority.

Effective Date and Duration of Certificate

"(g) Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Authority shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d) (2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Authority shall certify that operations thereunder have ceased: *Provided*, That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Authority, or if, for a period of ninety days or such other period as may be designated by the Authority, any such service is not operated, the Authority may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service.

Authority to Modify, Suspend, or Revoke

"(h) The Authority, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*,

That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Authority, with an order of the Authority commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Authority to have been violated. Any interested person may file with the Authority a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

Transfer of Certificate

"(i) No certificate may be transferred unless such transfer is approved by the Authority as being consistent with the public interest.

Certain Rights Not Conferred by Certificate

"(j) No certificate shall confer any proprietary, property, or exclusive right in the use of any air space, civil airway, landing area, or air-navigation facility.

Application for Abandonment

"(k) No air carrier shall abandon any route, or part thereof, for which a certificate has been issued by the Authority, unless, upon the application of such air carrier, after notice and hearing, the Authority shall find such abandonment to be in the public interest. Any interested person may file with the Authority a protest or memorandum of opposition to or in support of any such abandonment. The Authority may, by regulations or otherwise, authorize such temporary suspension of service as may be in the public interest.

Compliance With Labor Legislation

"(l) (1) Every air carrier shall maintain rates of compensation, maximum hours, and other working conditions and relations of all of its pilots and copilots who are engaged in interstate air transportation within the continental United States (not including Alaska) so as to conform with

decision numbered 83 made by the National Labor Board on May 10, 1934, not withstanding any limitation therein as to the period of its effectiveness.[15]

(2) Every air carrier shall maintain rates of compensation for all of its pilots and copilots who are engaged in overseas or foreign air transportation or air transportation wholly within a Territory or possession of the United States, the minimum of which shall be not less, upon an annual basis, than the compensation required to be paid under said decision 83 for comparable service to pilots and copilots engaged in interstate air transportation within the continental United States (not including Alaska).

(3) Nothing herein contained shall be construed as restricting the right of any such pilots or copilots, or other employees, of any such air carrier to obtain by collective bargaining higher rates of compensation or more favorable working conditions or relations.

(4) It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended.

(5) The term "pilot" as used in this subsection shall mean an employee who is responsible for the manipulation of or who manipulates the flight controls of an aircraft while under way including take-off and landing of such aircraft, and the term "copilot" as used in this subsection shall mean an employee any part of whose duty is to assist or relieve the pilot in such manipulation, and who is properly qualified to serve as, and holds a currently effective airman certificate authorizing him to serve as, such pilot or copilot.

Requirement as to Carriage of Mail

"(m) Whenever so authorized by its certificate, any air carrier shall provide necessary and adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the Postmaster General. Such

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[15] Para. (1) of Sec. 401 (l) was amended by act of April 29, 1942, 56 Stat. 265. The amendment was repealed by Act of July 25, 1947, 61 Stat. 449.

air carrier shall be entitled to receive reasonable compensation therefor as hereinafter provided.

Application for New Mail Service

(n) Whenever, from time to time, the Postmaster General shall find that the needs of the Postal Service require the transportation of mail by aircraft between any points within the United States or between the United States and foreign countries, in addition to the transportation of mail authorized in certificates then currently effective, the Postmaster General shall certify such finding to the Authority and file therewith a statement showing such additional service and the facilities necessary in connection therewith, and a copy of such certification and statement shall be posted for at least twenty days in the office of the secretary of the Authority. The Authority shall, after notice and hearing, and if found by it to be required by the public convenience and necessity, make provision for such additional service, and the facilities necessary in connection therewith, by issuing a new certificate or certificates or by amending an existing certificate or certificates in accordance with the provisions of this section.

Sec. 404(a), Civil Aeronautics Act, 52 Stat. 993, 49 U.S.C. 484(a) provides:

"SEC. 404 [*52 Stat. 993, 49 U. S. C. 484*] (a) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices, relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers."

Sec. 406, Civil Aeronautics Act, 52 Stat. 998, 49 U.S.C. 486, provides:

Rates for Transportation of Mail

Authority to Fix Rates

"SEC. 406 [*52 Stat. 998, 49 U. S. C. 486*] (a) The Authority is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

Rate-Making Elements

"(b) In fixing and determining fair and reasonable rates of compensation under this section, the Authority, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Authority shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and

quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

Statement of Postmaster General and Carrier

"(c) Any petition for the fixing of fair and reasonable rates of compensation under this section shall include a statement of the rate the petitioner believes to be fair and reasonable. The Postmaster General shall introduce as part of the record in all proceedings under this section a comprehensive statement of all service to be required of the air carrier and such other information in his possession as may be deemed by the Authority to be material to the inquiry.

Weighing of Mail

"(d) The Postmaster General may weigh the mail transported by aircraft and make such computations for statistical and administrative purposes as may be required in the interest of the mail service. The Postmaster General is authorized to employ such clerical and other assistance as may be required in connection with proceedings under this Act. If the Authority shall determine that it is necessary or advisable, in order to carry out the provisions of this Act, to have additional and more frequent weighing of the mails, the Postmaster General, upon request of the authority, shall provide therefor in like manner, but such weighing need not be for continuous periods of more than thirty days.

Availability of Appropriations

"(e) Except as otherwise provided in section 405(k), the unexpended balances of all appropriations for the transportation of mail by aircraft pursuant to contracts entered

into under the Air Mail Act of 1934, as amended, and the unexpended balances of all appropriations available for the transportation of mail by aircraft in Alaska, shall be available, in addition to the purposes stated in such appropriations, for the payment of compensation by the Postmaster General, as provided in this Act, for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith, between points in the continental United States or between points in Hawaii or in Alaska or between points in the continental United States and points in Canada within one hundred and fifty miles of the international boundary line. Except as otherwise provided in section 405(k), the unexpended balances of all appropriations for the transportation of mail by aircraft pursuant to contracts entered into under the Act of March 8, 1928, as amended, shall be available, in addition to the purposes stated in such appropriations, for payment to be made by the Postmaster General, as provided by this Act, in respect of the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith, between points in the United States and points outside thereof, or between points in the continental United States and Territories or possessions of the United States or between Territories or possessions of the United States.

Payments to Foreign Air Carriers

"(f) In any case where air transportation is performed between the United States and any foreign country, both by aircraft owned or operated by one or more air carriers holding a certificate under this title and by aircraft owned or operated by one or more foreign air carriers, the Postmaster General shall not pay to or for the account of any such foreign air carrier a rate of compensation for transporting mail by aircraft between the United States and such foreign country, which, in his opinion, will result (over such reasonable period as the Postmaster General may determine, taking account of exchange fluctuations and other factors) in such foreign air carrier receiving a higher rate of compensation for transporting such mail than such foreign country pays to air carriers for transporting its mail by

aircraft between such foreign country and the United States, or receiving a higher rate of compensation for transporting such mail than a rate determined by the Postmaster General to be comparable to the rate such foreign country pays to air carriers for transporting its mail by aircraft between such foreign country and an intermediate country on the route of such air carrier between such foreign country and the United States."

Sec. 801, Civil Aeronautics Act, 52 Stat. 1014, 49 U. S. C. 601, provides:

The President of the United States

"Sec. 801 [*52 Stat. 1014, 49 U. S. C. 601*] The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Authority before hearing thereon, and all decisions thereon by the Authority shall be submitted to the President before publication thereof. This section shall not apply to the issuance or denial of any certificate issuable under section 401 (e) or any permit issuable under section 402 (c) or to the original terms, conditions, or limitations of any such certificate or permit."

Sec. 1002(b), Civil Aeronautics Act, 2 Stat. 1018, 49 U. S. C. 642(b), provides:

"(b) The Authority is empowered at any time to institute an investigation, on its own initiative, in any case and as to any matter or thing concerning which complaint is authorized to be made to or before the Authority by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Authority shall have the same power to proceed with any

investigation instituted on its own motion as though it had been appealed to by complaint. "

Sec. 1006, Civil Aeronautics Act, 52 Stat. 1024, 49 U. S. C. 646, provides:

Orders of Authority Subject to Review

"Sec. 1006 [*52 Stat. 1024, 49 U. S. C. 646*] (a) Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Venue

"(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

Notice of Authority; Filing of Transcript

"(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Authority by the clerk of the court; and the Authority shall thereupon certify and file in the court a transcript of the record, if any, upon which the order complained of was entered.

Power of Court

"(d) Upon transmittal of the petition to the Authority, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Authority. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as

may be appropriate: *Provided,* That no interlocutory relief may be granted except upon at least five days' notice to the Authority.

Findings of Fact by Authority Conclusive

"(e) The findings of facts by the Authority, if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so.

Certification or Certiorari

"(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Authority shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code. "